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No. 94-1530

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

THINGS REMEMBERED, INC.,

Petitioner,

vs.

ANTHONY A. PETRARCA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION OF THE CONNECTICUT BAR ASSOCIATION, COMMERCIAL LAW AND BANKRUPTCY SECTION, TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE CONNECTICUT BAR ASSOCIATION, COMMERCIAL LAW AND BANKRUPTCY SECTION, IN SUPPORT OF RESPONDENT

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MOTION OF THE CONNECTICUT BAR ASSOCIATION, COMMERCIAL LAW AND BANKRUPTCY SECTION, TO FILE BRIEF *AMICUS CURIAE*

Pursuant to Rule 37.4 of the Rules of this Court, *amicus* the Connecticut Bar Association, Commercial Law and Bankruptcy Section ("CLBS") hereby moves for leave to file the attached brief *amicus curiae*.[1] Respondents have granted but

[1] The participation of CLBS as *amicus curiae* in this case has been approved by the Connecticut Bar Association.

Petitioner has refused consent for CLBS to file its brief *amicus curiae* in this case.[2]

As set forth in its bylaws, CLBS was organized to promote the objects of the Connecticut Bar Association ("CBA") within the field of commercial law and bankruptcy.[3] As set forth in relevant part in the constitution of the CBA:

> The objects of this Association shall be to advance the science of jurisprudence; to promote the administration of justice; [and] . . . to promote the leadership of the Bar in matters of public importance in the State and the Nation . . . .[4]

CLBS seeks leave to file the attached brief *amicus curiae* in support of its position that the administration of justice generally, and the administration of bankruptcy in particular, are impaired by the wasteful consequences of protracted litigation over where to litigate. CLBS contends that the decision of the Court of Appeals in this case furthers the goal of curtailing this type of wasteful litigation consistent with Congressional policy as expressed in the relevant statutes, and therefore CLBS supports affirmance of the decision of the court below. Consistent with Rule 37.1 of the Rules of this Court, CLBS seeks leave to file the attached brief to bring to the attention of the Court critical matters omitted by the parties.

CLBS contends that the Court of Appeals in this case correctly declined to review the order of the District Court remanding the underlying litigation back to the state tribunal in which it arose. The Court of Appeals did so on the basis of 28

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[2] CLBS files herewith the written consent of the Respondent to the submission of this brief.

[3] Bylaws of the Commercial Law and Bankruptcy Section of the Connecticut Bar Association, Art. I, § 2 (1984).

[4] The Constitution of the Connecticut Bar Association, Art. II, June 28, 1948.

U.S.C. §§ 1447(d) and 1452(b). Each of these statutory enactments contains a bar to review provision applicable to different kinds of remands: Section 1447(d) is applicable to jurisdictional remands of all kinds, and Section 1452(b) is applicable to "equitable" remands in bankruptcy cases. Petitioner contends that neither provision applies in this case.

CLBS has reviewed both the Brief of Petitioner filed in this case and the Brief of Respondent to be filed in this case. Neither Petitioner nor Respondent address in their submissions several crucial issues vital to consideration of this matter.

First, neither party addresses the relevant histories of the relevant statutes. Petitioner urges the Court to conclude that Section 1447(d) has no application in the bankruptcy context. However, the relevant historical background demonstrates that this provision, and its statutory predecessors, have applied in bankruptcy for over a century.

Second, Petitioner's argument rests on the presumption that Section 1452(b) implicitly repeals Section 1447(d) in the bankruptcy context. However, among other things, neither party has briefed the relevant legislative histories behind the two statutes to elucidate the existence (or lack thereof) of the legislative intent necessary to effect such a repeal. CLBS contends that reference to the legislative histories, coupled with a lack of any true conflict between Sections 1447(d) and 1452(b) (as well as other considerations), demonstrate that Congress did not intend the repeal of Section 1447(d) in the bankruptcy context and that no such intent can be presumed.

Third, neither party has briefed the issue of the significance of Sections 1447(d) and 1452(b) in the larger context of bankruptcy administration as a whole, nor have the parties briefed on a comparative basis the question of whether the decision of the court below is consistent or at odds with Congress' systematic effort across other analogous bankruptcy statutes to curtail protracted litigation over where to litigate in the bankruptcy appellate context. CLBS contends that the decision of the court below is consistent with Congress' larger effort in this regard.

Because of these omissions, and because of CLBS's interest in the resolution of the case at bar, CLBS requests leave to file the attached brief as *amicus curiae*.

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INTEREST OF *AMICUS CURIAE*

This brief is submitted on behalf of the Connecticut Bar Association, Commercial Law and Bankruptcy Section ("CLBS") as *amicus curiae*.[1] CLBS has obtained and files herewith the written consent of the Respondent to the submission of this brief. Petitioner, however, has refused its

[1] The participation of CLBS as *amicus curiae* in this case has been approved by the Connecticut Bar Association.

consent. Accordingly, pursuant to Rule 37.4 of the Rules of this Court, CLBS files herewith its motion for leave to file this brief as *amicus curiae*.

As set forth in its bylaws, CLBS was organized to promote the objects of the Connecticut Bar Association ("CBA") within the field of commercial law and bankruptcy.[2] As set forth in relevant part in the constitution of the CBA:

> The objects of this Association shall be to advance the science of jurisprudence; to promote the administration of justice; [and] . . . to promote the leadership of the Bar in matters of public importance in the State and the Nation . . . .[3]

CLBS submits this brief in support of its position that the administration of justice generally, and the administration of bankruptcy in particular, are impaired by the wasteful consequences of protracted litigation over where to litigate. The decision of the Court of Appeals in this case furthers the goal of curtailing this type of litigation and CLBS supports affirmance of the decision of the court below. Consistent with Rule 37.1 of the Rules of this Court, CLBS submits this brief to bring to the attention of the Court critical matters omitted by the parties.

STATEMENT

Respondent commenced the underlying litigation in this case in state court in Ohio on March 18, 1992.[4] Petitioner subsequently removed the action to federal court.[5] The instant

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[2] Bylaws of the Commercial Law and Bankruptcy Section of the Connecticut Bar Association, Art. I, § 2 (1984).

[3] The Constitution of the Connecticut Bar Association, Art. II, June 28, 1948.

[4] (J.A. at 18a).

[5] (J.A. at 19a).

controversy arises from the District Court's decision to remand that litigation to the state tribunal in which it arose.

The District Court ordered the remand for jurisdictional reasons, specifically finding that Petitioner had failed to timely remove the action to the federal forum.[6] On appeal, the Court of Appeals for the Sixth Circuit refused to review the propriety of the District Court's remand order, citing lack of appellate jurisdiction under two statutes: 28 U.S.C. § 1452(b) and 1447(d).[7]

SUMMARY OF ARGUMENT

Sections 1452(b) and 1447(d) each govern different types of remands. By its terms, Section 1452(b) applies only in the bankruptcy context and expressly bars appellate review of a district court's decision to remand on "*equitable*" grounds.[8] In contrast, Section 1447(d) is a statute of general applicability. Except with respect to certain civil rights actions,[9] it expressly bars appellate review of any order remanding on *jurisdictional* grounds.[10]

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[6] (J.A. at 31a).

[7] (J.A. at 36a).

[8] 28 U.S.C. § 1452(b) (1990) (emphasis added).

[9] Section 901 of the Civil Rights Act of 1964 amended Section 1447(d) to permit review of remand orders in certain civil rights cases. Civil Rights Act of 1964, Pub. L. No. 88-352, § 901, 78 Stat. 266. There are two other exceptions not contained in Section 1447(d). First, 28 U.S.C. § 1441a(1)(3)(C) (1991) grants the Resolution Trust Corporation the right to appeal "any order of remand entered by a United States district court". A similar provision grants the same right to the Federal Deposit Insurance Corporation. 12 U.S.C. § 1819(b)(2)(C) (1991). Second, several different statutes grant the United States the right to appeal remand orders entered in cases involving the property rights of certain tribes of American Indians. *See* 25 U.S.C. § 487(d) (1968), 25 U.S.C. § 642(b) (1970), and 25 U.S.C. § 670 (1972); *see also* Act of August 4, 1947, 61 Stat. 732.

[10] 28 U.S.C. § 1447(d) (1991); *see Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 346 (1976) (Section 1447(d) bars review of remand orders issued for lack of jurisdiction).

Petitioner contends that appellate review of the District Court's remand order is not barred by either of these provisions. First, Petitioner contends that Section 1452(b) does not apply in this case because Section 1452(b) only prohibits review of equitable remand orders, not jurisdictional ones, and the District Court's remand order here was jurisdictional in nature.[11] Second, Petitioner argues that Section 1447(d)'s prohibition against review of jurisdictional remand orders cannot apply in bankruptcy because to do so would create " 'incongruous results' and 'needless conflict and inconsistencies' " with Section 1452(b).[12] Regardless of whether Petitioner's first argument is correct, its second argument manifestly is not and Section 1447(d) expressly bars review of the District Court's remand order in this case.

First, Petitioner presents its argument in an historical vacuum. For well over a century, Sections 1441-1451 and their statutory predecessors (including Section 1447(d) and its statutory predecessors) have applied to removals and remands in bankruptcy cases. Indeed, before the enactment in 1978 of the immediate statutory predecessor to Section 1452(b),[13] removals and remands in bankruptcy cases were routinely effected *exclusively* pursuant to these general provisions. Since 1887, these general provisions have consistently enforced the principle that jurisdictional remand orders cannot be appealed. Petitioner's argument is thus at odds not only with the express language of the current Section 1447(d) but also over 100 years of settled law on the subject.

Second, given the relevant history behind Section 1447(d), Petitioner's argument that the statute does not apply in bankruptcy requires the inference that, in enacting Section 1452(b), Congress intended to repeal application of Section

[11] (Petitioner's Brief, at 8-18).

[12] (Petitioner's Brief, at 19 (quoting *Pacor v. Higgins*, 743 F.2d 984, 992 (3d Cir. 1984)).

[13] 28 U.S.C. § 1478 (1978) (repealed 1984).

1447(d) in the bankruptcy context. There is, however, no basis for such an inference. Sections 1452(b) and 1447(d) simply do not conflict, let alone irreconcilably so, and there is nothing in the legislative history or purpose of either statute that supports an implicit repeal. In the absence of an irreconcilable conflict, there is no reason to preclude application of the statute in accordance with its terms. *See, e.g., Connecticut National Bank v. Germain*, 503 U.S. 249, 253 (1992) ("so long as there is no 'positive repugnancy' between the two laws, . . . a court must give effect to both.").

Petitioner also urges the Court to conclude that Section 1447(d) does not apply on the ground that appellate review of jurisdictional remands in bankruptcy is desirable due to the complexity of bankruptcy jurisdiction and the need for further judicial development in this important area.[14] In making this argument, however, Petitioner ignores the larger context of bankruptcy administration as a whole and the proper place for extensive consideration of its jurisdictional complexities.

As Justice Scalia remarked in *Bowen v. Massachusetts*, 487 U.S. 879, 930 (1988) (Scalia, J., dissenting), "[n]othing is more wasteful than litigation about where to litigate . . . ." Bankruptcy administration is particularly sensitive to such waste, given the inherent lack of resources present in most bankruptcy cases and the fact that Congress intended bankruptcy administration to be expeditious and inexpensive.[15] Questions of bankruptcy jurisdiction certainly deserve careful attention on appeal, but removal is simply the wrong place for it.

As this case demonstrates, the process of litigating over where to litigate is often cumbersome, time-consuming,

[14] (Petitioner's Brief, at 24-25).

[15] *See, e.g., National Labor Relations Board v. Bildisco & Bildisco*, 465 U.S. 513, 517 n.1 (1984) (noting that Congress enacted the business reorganization provisions of the Bankruptcy Code "with the intention that business reorganizations should be quicker and more efficient . . .") (citing H.R. Rep. No. 95-595, p. 5 (1977)).

expensive, and, sometimes, difficult to comprehend. In the matter *sub judice*, the ostensible reason for the removal to the District Court in Ohio was that the state court action was related in some way to the bankruptcy case of a debtor seeking reorganization in a bankruptcy court in New York.[16] That bankruptcy case, however, is now long since over,[17] yet the parties in this case are still engaged in litigating over whether the Petitioner may have the case tried in a court that in all likelihood no longer would have jurisdiction over the matter.[18]

The questionable value of the endeavor is thus self-evident, and yet it is likely to repeat itself if the type of appellate review sought by Petitioner is permitted. Congress clearly intended to foreclose this sort of waste and has done so by statute for over 100 years. Furthermore, in each instance where it intends to exempt a matter from the general scope of Section 1447(d), it does so expressly, not implicitly.[19] For the reasons summarized above and discussed in detail below, this Court should affirm the decision of the Court of Appeals.

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[16] Petitioner's strategy was to obtain removal to the District Court in Ohio and then a transfer of the case to the Southern District of New York where the bankruptcy was pending. (*See* J.A. at 16a and 20a).

[17] *In re Child World Inc.*, Case No. 92 B 20887 (JG) (Bankr. S.D.N.Y.). The bankruptcy court confirmed the plan of the related debtor on June 24, 1994.

[18] Jurisdiction would likely be lacking because, at this point, the outcome of the litigation probably would have no impact on the administration of the debtor's bankruptcy estate. *See, e.g., In re Gardner*, 913 F.2d 1515, 1518-19 (10th Cir. 1990) (where dispute "not otherwise related and would not affect the distribution of assets and administration of the bankruptcy estate, we hold the bankruptcy court lacked jurisdiction to resolve the dispute"); *In re Hall's Motor Transit Co.*, 889 F.2d 520, 522-23 (3d Cir. 1989) ("the usual test of determining whether a civil proceeding, such as we have here[between two non-debtor parties], is related to bankruptcy is whether 'the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy.'") (citing *Pacor v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984)).

[19] *See* note 9, *supra*.

ARGUMENT

I. SECTION 1447 AND ITS STATUTORY PREDECESSORS HAVE LONG APPLIED IN BANKRUPTCY AND THERE IS NO BASIS TO CONCLUDE THAT SECTION 1447(d) DOES NOT APPLY IN THIS CASE.

The history of Section 1447(d) and its statutory predecessors is one marked by three relevant themes: promotion of judicial economy, generous construction towards that end, and long-standing application in the bankruptcy context. Likewise, the comparatively brief history of Section 1452(b) echoes the same themes, but its application is necessarily slightly different. As this Court has made clear, Section 1447(d) governs remands for jurisdictional reasons alone. *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 346 (1976). On the other hand, Section 1452(b) expressly applies to remands for "equitable" reasons--a type of remand Section 1447 clearly does not authorize.

Given the different focus of each of these two provisions, it is hardly surprising that the specific rules governing their application are distinct in some respects. However, these differences do not create a conflict, and there is no valid reason to infer that, in enacting Section 1452(b), Congress intended to repeal Section 1447(d) in bankruptcy. Indeed, indulging in such a presumption would eliminate the only express statutory basis in bankruptcy for remands based on jurisdictional grounds.[20] Although Petitioner would like to open up this void, it is a void that Congress filled in long ago. Since the interpretation urged by Petitioner is at odds with the

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[20] This is true, of course, only to the extent that the phrase "on any equitable ground" contained in Section 1452(b) is construed as not embracing jurisdictional remands. Petitioner argues that this phrase does not embrace jurisdictional remands. (Petitioner's Brief, at 13-18). Respondent argues that it must. (Respondent's Brief, at 14-31). If Respondent is correct, then Section 1452(b) supplies a basis for affirmance of the decision below independent of Section 1447(d).

long-standing purpose of Sections 1447(d) and 1452(b) as well as the plain language of Section 1447(d), it is unwarranted.

A. The History, Purpose, Language and Policy of Section 1447(d) Clearly Proscribe Review of Remand Orders such as the Remand Order in this Case.

The end of the Civil War marked the beginning of a dramatic rise in the jurisdiction of the federal courts, including an expanded power of removal.[21] In the immediate post-Civil War era, removal jurisdiction reached its zenith with the Act of March 3, 1875.[22]

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[21] The original Judiciary Act of 1789 provided for removal in a narrow range of controversies. 1 Stat. 73, § 12; *see* 1A James W. Moore et al., Moore's Federal Practice ¶ 0.156[1] at 14 (2d ed. 1993) (discussing removal provisions of the Act of 1789 and *ad hoc* removal legislation until the Civil War). After the Civil War, however, Congress greatly expanded the power. *See* Frankfurter and Landis, The Business of the Supreme Court, A Study in the Federal Judicial System, pp. 61-63 n. 22 (MacMillan, 1928) [hereinafter "Business of the Supreme Court"]; *see also* 1A Moore, Moore's Federal Practice *supra* ¶ 0.156[1] at 14-17.

[22] 18 Stat. 470, § 2; *see Gibson v. Bruce*, 108 U.S. 561, 562 (1883) ("the act of 1875 is radically different from any which preceded it"). Section 2 of this Act provided as follows:

> That any suit of a civil nature, at law or in equity, now pending or hereafter brought in any State court where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which the United States shall be plaintiff or petitioner, or in which there shall be a controversy between citizens of different States, or a controversy between citizens of the same State claiming lands under grants of different States, or a controversy between citizens of a State of foreign states, citizens, or subjects, either party may remove said suit into the circuit court of the United States for the proper district.
>
> And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States,

(Footnote continued)

However, in addition to its impact on an already overloaded federal judiciary,[23] the ability to remove an unprecedented number of new cases "to distant federal courts made litigation costly as well as slow, and thus doubly harassing."[24] This Court was particularly affected. The practice of prosecuting appeals of removal and remand orders contributed significantly to the Court's overburdened docket which, by 1890, had reached an impossible load of 1800 cases.[25] As congestion and other problems within the federal judicial system worsened, Congress moved to restrict the removal provisions with the Act of March 3, 1887.[26]

> and which can be fully determined as between them, then either one or more of the plaintiffs or defendants actually interested in such controversy may remove said suit into the circuit court of the United States for the proper district.

18 Stat. 470, § 2. Section 2 of the Act provided for the right of removal. Section 3 prescribed how the right might be effected. *See* 1A Moore, Moore's Federal Practice *supra* ¶ 0.156[1] at 17.

[23] *See* Business of the Supreme Court, at 77-78 (observing in the context of severe congestion within the federal judicial system that the Act of 1875, expanding the provisions for removal, "added voluminously to the business of the federal courts without equipping them to discharge it.").

[24] Business of the Supreme Court, at 80.

[25] *See Morey v. Lockhart*, 123 U.S. 56, 57 (1887) (noting that, under the authority of Section 5 of the Act of 1875, "numerous cases have been brought to this court by appeal or writ of error for the review of such [remand] orders."); *see also* Business of the Supreme Court, at 86 (noting that from the October term of 1884 to the term in 1890, the Supreme Court's docket had risen from an impossible level of 1315 cases to the "absurd total of 1800"). Ultimately, this congestion found meaningful relief in the substantial reforms in 1891. *See also id.* at 93-102 (chronicling the efforts at reform leading up to the Act of March 3, 1891, 26 Stat. 826, creating, among other things, the circuit courts of appeals).

[26] 24 Stat. 552-53; *see* Business of the Supreme Court, at 93-95 (describing some of its provisions and observing that the Act "eased the pressure upon the lower courts"). The Act of 1887 is sometimes referred to as the Act of 1887-88, due to its reenactment August 13, 1888 to correct some technical mistakes. 25 Stat. 433; *see Ex parte Pennsylvania Co.*,

(Footnote continued)

The Act of 1887 made removal generally less available and more exacting.[27] In addition, for the first time it expressly prohibited appellate review of remand orders.[28] This last feature marked a broad departure from the Act of 1875, which had expressly authorized such review.[29] With respect to the scope of this novel bar to review provision, this Court explained in *Morey v. Lockart*, 122 U.S. 56, 58 (1997), that the Act of 1887 eliminated *any* right of review regardless of the ground for the remand.[30] In addition, although the Act did not mention extraordinary review by writ of mandamus, this

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137 U.S. 451, 454 (1890); 1A Moore, Moore's Federal Practice *supra* ¶ 0.156[1] at 17.

[27] *See* 1A Moore, Moore's Federal Practice *supra* ¶ 0.156[1] at 17-18 (discussing Act of 1887).

[28] Specifically, the Act provided as follows:

> Whenever any cause shall be removed from any State court into any Circuit Court of the United States, and the Circuit Court shall decide that the cause was improperly removed, and order the same to be remanded to the State court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the Circuit Court so remanding such cause shall be allowed.

24 Stat. 553; *see Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. at 346-47 (discussing provision).

[29] Section 5 of the Act of 1875 provided that any "order of said circuit court dismissing or remanding said cause to the State court shall be reviewable by the Supreme Court on writ of error or appeal, as the case may be." 18 Stat. 472, § 5. Before the Act of 1875, review of remand orders had not been permitted because such orders were held to be not within the contemplation of the appellate jurisdiction provisions. *Railroad Co. v. Wiswall*, 90 U.S. (23 Wall.) 507, 508 (1875); *see also Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 346 (1976); *State of Georgia v. Rachel*, 384 U.S. 780, 786 n.6 (1966) (discussing development); *Morey v. Lockhart*, 123 U.S. at 57 (describing previous practice).

[30] *See also* B.C. Moon, The Removal of Causes, § 204, at 637 (The Banks Law Publishing Co. 1901) (observing that the Act of 1887 "took away the right to review . . . no matter on what ground the removal was procured").

Court nonetheless construed the prohibition to apply to this form of relief as well.[31]

The removal section of the Judicial Code of 1911[32] embodied in substantial form the provisions of the Act of 1887,[33] and included a bar to review provision virtually identical to that of its predecessor.[34] Although the statute again provided no express prohibition against review through mandamus, this Court in *In re Matthew Addy Steamship Commerce Corp.*, 256 U.S. 417, 420 (1921), reaffirmed its prior determination that Congress intended to preclude all forms of appellate review, not simply those listed in the statute.[35]

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[31] In *Ex parte Pennsylvania*, 137 U.S. at 454, this Court concluded as follows:

> In terms, [the Act of 1887] only abolishes appeals and writs of error, . . . and does not mention writs of *mandamus*; and it is unquestionably a general rule that the abrogation of one remedy does not affect another. But in this case, we think, it was the intention of congress to make the judgment of the circuit court remanding a cause to the state court final and conclusive.

[32] Jud. Code, § 28 (1911), 28 U.S.C. § 71 (1940).

[33] 1A Moore, Moore's Federal Practice *supra* ¶ 0.156[1] at 18-19. There was one intermediary statute between the Act of 1887 and the Judicial Code of 1911. *See* Act of April 5, 1910, 36 Stat. 291, § 1.

[34] As amended in 1914, Section 28 of the Judicial Code of 1911 provided in pertinent part as follows:

> Whenever any cause shall be removed from any State court into any district court of the United States, and the district court shall decide that the cause was improperly removed, and order the same to be remanded to the State court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the district court so remanding such cause shall be allowed.

28 U.S.C. § 71 (1940). *See Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. at 347-48 (discussing provision).

[35] In reaching its determination, the Court noted with regret the split of authority in the lower courts on the particular substantive issue at bar, but

(Footnote continued)

Subsequently, the Judicial Code of 1948 codified the federal removal provisions of its predecessors in 28 U.S.C. §§ 1441-1451 (as amended). Although the Judicial Code of 1948 failed to codify the bar to review provision of Section 28 of the Judicial Code of 1911, this oversight[36] was remedied in 1949 with the addition of Section 1447(d).[37] The current Section 1447(d) now reads in full as follows:

> (d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title [pertaining to certain civil rights cases] shall be reviewable by appeal or otherwise.

28 U.S.C. § 1447(d).[38]

In *United States v. Rice*, 327 U.S. 742, 751-52 (1946), this Court summarized the long-standing policy underlying the bar to review provision of Section 1447(d) in the following terms:

> Congress, by the adoption of the [bar to review provisions of the various removal Acts since 1887], as

concluded nonetheless that "section 28 of the Judicial Code is controlling, and Congress alone has power to afford relief." *Id. Accord Employers Reinsurance Corp. v. Bryant*, 299 U.S. 374, 380-81 (1937) (quoting *Ex parte Pennsylvania*, 137 U.S. 451, 454 (1890)).

[36] *See* 1A Moore, Moore's Federal Practice *supra* ¶ 0.169[2.-1] at 686, n.1; *see also Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. at 347-48 (mentioning oversight).

[37] As it first appeared, Section 1447(d) provided as follows: "An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise." 63 Stat. 89; *see* 1A Moore, Moore's Federal Practice *supra* ¶ 0.169[2.-1] at 686.

[38] *See* H.R. Rep. No. 352, 81st Cong., 1st Sess. (1949), *reprinted in* 1949 U.S.C.C.A.N. 1248, 1268 (providing that the new Section 1447 was included "to remove any doubt that the former law as to the finality of an order to remand to a State court is continued").

> thus construed [by this Court], established the policy of not permitting interruption of the litigation of the merits of a removed cause by prolonged litigation of questions of jurisdiction of the district court to which the cause is removed. This was accomplished by denying any form of review of an order of remand, and, before final judgment, of an order denying remand. In the former case, Congress has directed that upon the remand the litigation should proceed in the state court from which the cause was removed.

The statute and its policy are thus clear: there shall be no review of remand orders.[39]

An exception to this blanket rule is to be found in *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976), which involved a properly removed state court proceeding that the district court remanded, not on any proper statutory basis, but instead on the basis of the court's crowded docket.[40] Finding such grounds to be completely and transparently unauthorized by Section 1447(c),[41] the Court held that Section

[39] *Accord Mobile Corp. v. Abeille General Ins. Co.*, 984 F.2d 664, 666 (5th Cir. 1993); *Chandler v. O'Bryan*, 445 F.2d 1045, 1057 (10th Cir. 1971); *Appalachian Volunteers, Inc. v. Clark*, 432 F.2d 530, 533 (6th Cir. 1970), *cert. denied*, 401 U.S. 939 (1971); *In re MacNeil Bros. Co.*, 259 F.2d 386, 388 (1st Cir. 1958); *Peerless Weighting & Vending Mach. Corp. v. Public Bldg. Comm. of Chicago*, 209 F. Supp. 877, 882 (N.D. Ill. 1962), *app. dismissed*, 371 U.S. 801 (1962).

[40] *Id.* at 340-41.

[41] At the time, Section 1447(c) read as follows:

> If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs.

28 U.S.C. § 1447(c) (1991). Amended in 1988, the current provision deletes the word "improvidently", adds a 30 day time limit for the filing of motions to remand, and alters the provision in other non-material respects. The Judicial Improvements and Access to Justice Act of 1988, Pub. L. 100-702, 102 Stat. 4670.

1447(d) did not apply. However, in reaching this conclusion, the Court was careful to admonish that "we neither disturb nor take issue with the well-established general rule that § 1447(d) and its predecessors were intended to forbid review by appeal or extraordinary writ of any order remanding a case on the grounds permitted by the statute."[42] Furthermore, as made clear in *Gravitt v. Southwestern Bell Telephone Co.*, 430 U.S. 723, 724 (1977), "*Thermtron* did not question but re-emphasized the rule that § 1447(c) remands are not reviewable." *Thermtron* is thus the proverbial exception that proves the rule. Since the unusual facts of *Thermtron* are not present in this case, *Thermtron* presents no barrier to application of Section 1447(d) here.

B. Section 1447 and Its Statutory Predecessors Have Long Applied in Bankruptcy.

It has long been recognized that many types of actions relating to bankruptcy cases may be adjudicated in courts other than the federal bankruptcy court (including the state courts or some other federal forum), subject to any relevant statutory right of removal.[43] Until the Bankruptcy Reform Act of 1978,[44] however, the Nation's various bankruptcy statutes included no special removal or remand provisions of their

[42] *Thermtron*, 423 U.S. at 351-52.

[43] *See, e.g., Bardes v. First National Bank of Hawarden*, 178 U.S. 524, 532 (1900) (discussing concurrent jurisdiction over many types of suits related to bankruptcy matters in the context of the Bankruptcy Acts of 1867 and 1898); *see also* 28 U.S.C. § 1409(b) (1984) (requiring certain actions in bankruptcy to be brought in an appropriate forum in the district in which the defendant resides); 28 U.S.C. § 1334(a)-(b) (1994) (providing in subsection (a) that the District Courts shall have exclusive and original jurisdiction over bankruptcy cases, but providing in subsection (b) that the district courts have original but not exclusive jurisdiction of proceedings arising under title 11, or arising in or related to cases under title 11).

[44] Pub. L. 95-598, 92 Stat. 2549.

own.[45] Instead, removal and remand was routinely accomplished and analyzed pursuant to the general federal removal and remand provisions of Sections 1441-1451 and their statutory predecessors.

For example, in *Woolridge v. McKenna*, 8 F. 650 (Cir. Ct. Tenn. 1881), the assignee[46] of a bankrupt under the Bankruptcy Act of 1867 commenced an action in state court against a minor defendant seeking the avoidance of a conveyance of land.[47] The minor defendant sought removal to the federal circuit court[48] pursuant to the Act of 1875.[49] In deciding to remand the matter for lack of jurisdiction over the minor for want of a binding appearance by a representative authorized to appear on the minor's behalf and effect the removal,[50] the court analyzed the removal process in bankruptcy as follows: "the assignee has been vested with power to bring this suit in the state court where he did bring it, *and*

[45] The Nation has had five bankruptcy Acts: The Bankruptcy Act of 1800, 2 Stat. 19 (repealed 1803); The Bankruptcy Act of 1841, 5 Stat. 440 (repealed 1843); The Bankruptcy Act of 1867, 14 Stat. 517 (repealed 1878); The Bankruptcy Act of 1898, 30 Stat. 544 (repealed 1979), and the current Bankruptcy Code enacted pursuant to the Bankruptcy Reform Act of 1978.

[46] Section 13 of the Bankruptcy Act of 1867 provided for creditors to elect "one or more assignees of the estate of the debtor . . . ." The function of the assignee was similar to that of a trustee under the current Bankruptcy Code. *See* 11 U.S.C. § 702 (1984) (election of trustee in Chapter 7 case); 11 U.S.C. § 704 (1986) (duties of trustee).

[47] *See id.* at 670, 672. Section 35 of the Bankruptcy Act of 1867 provided for the avoidance of fraudulent transfers, and empowered the assignee to "recover the property, or the value thereof, as assets of the bankrupt." *See* 11 U.S.C. § 548 (1994) (fraudulent transfers).

[48] The Judicial Code of 1911 abolished the circuit courts, leaving the present structure of District Courts, the Circuits Courts of Appeals and the Supreme Court. Judicial Code of 1911, § 289, 36 Stat. 1167.

[49] *Woolridge*, 8 F. at 670.

[50] *Id.* at 675-76.

we can only obtain jurisdiction by removal as in other cases."[51]

Similarly, in *Feibelman v. Packard*, 109 U.S. 421 (1883), a district court sitting in bankruptcy ordered the seizure of property of the debtor in the hands of a third party.[52] The third party commenced an action in state court against the marshal who had seized the property. While the action was pending, the Act of 1875 took effect, the suit was removed pursuant to its provisions, and this Court subsequently affirmed the propriety of the removal as relating to a question in bankruptcy and an order of the bankruptcy court.[53] *See also Spencer v. Duplan Silk Co.*, 191 U.S. 526, 531-32 (1903) (case concerning review of appeal of decision in bankruptcy matter removed to federal court on grounds of diverse citizenship under general removal statute).

Subsequently, under the Bankruptcy Act of 1898, removals and remands were likewise accomplished under the general removal statutes. As explained in the leading bankruptcy treatise of the time: "removal of the cause to the proper district court may be had *only under the same conditions as govern removal generally*." 2 James W. Moore et al., Collier on Bankruptcy, ¶ 23.21 at 645 (14th ed. 1976) (emphasis added). Thus, for example, whenever a trustee in bankruptcy commenced an action in state court against a defendant under a provision of the Bankruptcy Act, the defendant was permitted to "obtain removal to the federal court only on the same basis

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[51] *Id.* at 676-77 (emphasis added).

[52] *Id.* at 424-25.

[53] The Court phrased the question as follows: "The question . . . is, whether under the bankrupt act of 1867, the district court of the United States, sitting in bankruptcy, has jurisdiction to order the seizure and detention of goods, the property of the bankrupt, although in possession of another under claim of title, and whether, in a subsequent action against the officer for obedience to such an order, he may justify the seizure by proof that the title to the property was at the time in the bankrupt." *Id.* at 426.

as in any other case." 2 Moore, Collier on Bankruptcy *supra* ¶ 23.21 at 647.[54]

Lastly, courts acting in cases under the current Bankruptcy Code[55] have also applied the bar to review principle found in Section 1447(d) to bar review of jurisdictional remand orders. *See, e.g., Hernandez v. Brakegate, Ltd.*, 942 F.2d 1223, 1225 (7th Cir. 1991) ("Sections 1447 and 1452 belong to Chapter 89 of Title 28 . . . [and n]othing in text or structure suggests that the general provisions of § 1447 are inapplicable to cases removed under § 1452, any more then they would fall away for removals under § 1442 (federal officers), § 1442a (members of armed forces), or other statutes authorizing removal.").[56] *Contra Pacor v. Higgins*, 743 F.2d 984, 992 (3d Cir. 1984) (holding that Section 1447(d) does not apply in bankruptcy). The issue before the Court is whether application of Section 1447(d) in the bankruptcy context under the current Bankruptcy Code is improper given the existence of 28 U.S.C. § 1452(b).

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[54] *See also, e.g., Tenenbaum v. Walter E. Heller & Co.*, 308 F. Supp. 1085, 1088-89 (S.D.N.Y. 1970) (applying general remand provisions in analyzing whether to remand actions related to bankruptcy case); *Whitman v. Chicago & N.W. Ry. Co.*, 70 F. Supp. 9, 11-12 (D. Minn. 1947) (analyzing issue of remand pursuant to the general federal removal provisions); *Swofford v. Cornucopia Mines of Oregon*, 140 F. 957, 958-59 (Cir. Ct. D. Ore. 1905) (remanding case removed by trustee in bankruptcy).

[55] 11 U.S.C. § 101, et seq. (1994)

[56] Similarly, this Court in *Rice* suggested that Section 1447(d) should be construed as a statute of general applicability:

> As we have already indicated, and as the legislative history shows, the [bar to review provisions] of the Act of 1887 were intended to be applicable not only to remand orders made in suits removed under the Act of 1887, but to orders of remand made in cases removed under any other statutes, as well.

United States v. Rice, 327 U.S. 742, 751-52 (1946); *see also Employers Reinsurance Corp. v. Bryant*, 299 U.S. at 380-81 (the provisions of the Act of 1887 "are intended to reach and include all cases removed from a state court into a federal court and remanded by the latter").

C. Nothing in Section 1452 Prevents Application of Section 1447(d) in this Case.

Section 1452 provides as follows:

> (a) A party may remove any claim or cause of action in a civil action other than a proceeding before the United States Tax Court or a civil action by a governmental unit to enforce such governmental unit's police or regulatory power, to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title [the general bankruptcy jurisdictional provision].
>
> (b) The court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground. An order entered under this subsection remanding a claim or cause of action, or a decision not to remand, is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title.[57]

By its own terms, Section 1452 authorizes remands "on any equitable ground", and this has been held to embrace a variety of non-jurisdictional justifications. *See, e.g., River Cement Co. v. Bangert Bros. Constr. Co.*, 852 F.Supp. 25, 27 (D. Colo. 1994) (remanding case after considering the following factors: "1) duplication of judicial resources; 2) uneconomical use of judicial resources; 3) effect of remand on the administration of the bankruptcy estate; 4) case involves questions of state law better addressed by a state court; 5) comity; 6) prejudice to the involuntarily removed parties; 7) lessened

[57] 28 U.S.C. § 1452 (1990).

possibility of an inconsistent result; and 8) expertise of the court where the action originated").[58]

In contrast, as demonstrated above, Section 1447 is limited to remands on jurisdictional grounds. The two thus govern different specie of remands. They do not conflict.

In arguing that Sections 1452(b) and 1447(d) do conflict, Petitioner relies heavily on *Pacor v. Higgins*, 743 F.2d 984 (3d Cir. 1984). In *Pacor*, however, the Court of Appeals for the Third Circuit indulged in a demonstrably erroneous analysis.

First, the court compared the general removal provisions, 28 U.S.C. §§ 1441-1447, to Section 1452. Second, the court identified differences between these two sets of provisions. Third, the court concluded that, since there are differences between the general provisions and Section 1452, *none* of the provisions of the former could apply in the context of the latter.[59]

Concededly, there are, of course, differences between *removal* practices under Sections 1441-1447 and Section 1452(b). As Petitioner points out,[60] it is true, for example, that

[58] *See also Scherer v. Carroll*, 150 B.R. 549, 552 (D. Vt. 1993); *In re Riverside Nursing Home*, 144 B.R. 951, 956-957 (S.D.N.Y. 1992); *Drexel Burnham Lambert Group, Inc. v. Vigilant Ins. Co.*, 130 B.R. 405, 407 (S.D.N.Y. 1991); *Lone Star Indus., Inc. v. Liberty Mut. Ins.*, 131 B.R. 269, (D. Del. 1991); *Baxter Healthcare Corp. v. Hemex Liquidation Trust*, 132 B.R. 863, 867-868 (N.D. Ill. 1991); *Cook v. Griffin*, 102 B.R. 875, 877 (N.D. Ga. 1989); *Gorse v. Long Neck, Ltd.*, 107 B.R. 479, 482 (D. Del. 1989); *In re Fay*, 155 B.R. 1009, 1012 (Bankr. E.D. Mo. 1993); *In re Branded Products, Inc.*, 154 B.R. 936, 947 (Bankr. W.D. Tex. 1993); *In re El Paso Pharm. Inc.*, 130 B.R. 492, 497 (Bankr. W.D. Tex. 1991); *In re Ross*, 64 B.R. 829, 835 (Bankr. S.D.N.Y. 1986); *Zweygardt v. Colorado Nat'l Bank of Denver*, 52 B.R. 229, 234-235 (Bankr. D. Colo. 1985); 1 Lawrence P. King, Collier on Bankruptcy ¶ 3.01[4][g] at 3-98-99 (15th ed. 1994) (discussing factors and Section 1452(b) generally).

[59] *Id.* at 992.

[60] (Petitioner's Brief, at 24-25).

the time for filing a removal petition under the general provisions is different from practice under Section 1452. This difference, however, is a narrow one and arises not because of a conflict between Sections 1447(d) and 1452(b), but because of a difference between Section 1446(b) and Rule 9027(a)(2) of the Federal Rules of Bankruptcy Procedure.[61] This hardly suffices to demonstrate an implicit repeal of Section 1447(d) in bankruptcy.

It cannot be the case that a rule of procedure can create a conflict that results in the repeal *sub silentio* of an important statutory prohibition that has applied in bankruptcy for over a century. This is particularly true given the prohibition expressed in 28 U.S.C. § 2075 (1994) that the rules of bankruptcy procedure "shall not abridge, enlarge, or modify any substantive right."[62]

In addition, it should be pointed out that, in the specific context of remand procedure, there is *no* conflict between Section 1447(c) (specifying the time limit for filing a motion to remand) and Fed. R. Bankr. P. 9027(d) (1991) (providing that a motion for remand shall be governed by Fed. R. Bankr. P. 9014 (1987), but not specifying a time limit). Lastly,

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[61] *Compare* 28 U.S.C. § 1446(b) (1991) (providing a thirty day time limit for the filing of the notice of removal) *with* Fed. R. Bankr. P. 9027(a)(2) (1991) (providing a formula for measuring the time limits for the filing of removal notices if the action is commenced before the bankruptcy petition is filed). It should be noted, however, that Fed. R. Bankr. P. 9027(a)(3) (1991) (specifying the time limit for filing a notice of removal if the action is commenced after the commencement of the bankruptcy case) is virtually identical to Section 1446(b).

[62] 28 U.S.C. § 2075 (1994). Furthermore, the differences in the filing deadline rules may be readily harmonized. For example, it might be concluded that Fed. R. Bankr. P. 9027 simply does not apply in any situation where Section 1446(b) does apply. *See, e.g., Intra Muros Trust v. Truck Stop Scale Co.*, 163 B.R. 344, 345 (N.D. Ill. 1994) (holding that thirty day time limit of Section 1446(b) applies in a bankruptcy removal under Section 1452 notwithstanding Fed. R. Bankr. P. 9027(a)(2)). *Contra In re Eagle Bend Development*, 61 B.R. 451, 458 (Bankr. W.D. La. 1986) (holding that Fed. R. Bankr. P. 9027 governs in bankruptcy removal cases).

differences between *removal* practice under Sections 1441-1451 and Section 1452 cannot justify ignoring Congress' clear expression in the *remand* context of its intent to curtail the wasteful practice of protracted litigation over where to litigate.

On this last point, this Court's analysis in *Connecticut National Bank v. Germain*, 503 U.S. 249 (1992) is highly instructive. There this Court considered whether a jurisdictional statute applicable only in bankruptcy, 28 U.S.C. § 158(d) (1994), implicitly repealed a jurisdictional statute of general applicability, 28 U.S.C. § 1292(b) (1992). Respondent in that case urged that it did because (1) the general statute provided jurisdiction that the more specific statute did not and the specific statute should control, and (2) application of both 158(d) and 1292(b) would create an "unusual" overlap in the larger jurisdictional scheme since Section 1292's companion, 28 U.S.C. § 1291 (1982), largely provides the same kind of jurisdiction as does Section 158(d).[63] Recognizing, among other things, that the Courts of Appeals had long exercised in bankruptcy the type of jurisdiction provided in Section 1292,[64] and that an implicit repeal would leave the Courts of Appeals completely without jurisdiction in cases otherwise governed by Section 1292, this Court refused to infer an implicit repeal and, instead, concluded that Section 1292(b) must be applied as written regardless of any overlap that might arise between Section 158(d) and Section 1291. *Germain*, 503 U.S. at 253-54. This Court should reach the same conclusion in the context of Sections 1452(b) and 1447(d).

Furthermore, nothing in the legislative history behind Section 1452 indicates any evidence of a Congressional intent to repeal Section 1447(d) in the bankruptcy context. On the

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[63] *Germain*, 503 U.S. at 253-54; *see also id.* at 255 (Stevens, J., concurring) (noting the unusual overlap between Section 158(d) and 1291).

[64] *Id.* at 256 (O'Conner, J., concurring) ("Congress probably did not intend to deprive the Courts of Appeals of their long-standing jurisdiction over interlocutory appeals in bankruptcy.").

contrary, reference to the underlying purpose of Section 1452 only supports continued application of both provisions in accordance with their terms.

D. Reference to the Relevant Legislative History and Purpose of Section 1452(b) Refutes Petitioner's Position.

Section 1452 is derived almost verbatim from former 28 U.S.C. § 1478.[65] The text of Section 1478 was originally proposed in the House on January 4, 1977.[66] Subsequently, in preparation for enacting what ultimately became the Bankruptcy Reform Act of 1978 (the "Reform Act"),[67] the House passed a bankruptcy bill including language virtually identical to the 1977 proposal.[68] This language survived virtually

[65] *See* 1 King, Collier on Bankruptcy *supra* ¶ 3.01[4][a] at 3-88-89. Section 1478 was implicitly repealed by Pub. L. No. 98-353, 98 Stat. 335 (1984).

[66] H.R. 6, 95th Cong., 1st Sess. (1977). Previously, on January 17, 1975, a far more elaborate removal provision had been introduced in the Senate. Sen. 235, 94th Cong., 1st Sess. (1975). The bill would have authorized the bankruptcy court to remand any action as follows:

> (3) Remand When Removal Is Improvident. If at any time before final judgment entered by the bankruptcy court it appears that the action was removed improvidently and without jurisdiction, the bankruptcy court shall remand the action and may order the payment of just costs. A certified copy of the order of remand shall be mailed by the clerk of the bankruptcy court to the clerk of the court to which the case is remanded. The action may thereupon proceed in the court as if the removal had not occurred.

There was no provision governing review on appeal. Comments on the proposal were received at public hearing from two individuals. *See* Hearings on S. 235 and S. 236 Before Senate Comm. on the Judiciary, 94th Cong., 1st Sess. 491 (statement of Rex Lee, Assist. Attorney General) and 806 (Statement of William T. Plumb, Jr., Esq.) (1975).

[67] Pub. L. No. 95-598, 92 Stat. 2549 (1978).

[68] H.R. 8200, 95th Cong., 2d Sess. (1978), 124 Cong. Rec. H466-472 (Feb. 1, 1978). H.R. 8200 provided as follows:

(Footnote continued)

unchanged in the final draft of the Reform Act.[69]

The only significant difference in the language of Section 1452 and 1478 is that Section 1452 contemplates removal to the district court, while Section 1478 contemplated removal directly to the bankruptcy court.[70] The reason for this change stems from this Court's decision in *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (Brennan, J., plurality opinion), invalidating the bankruptcy jurisdictional provisions. Following *Marathon*, Congress revamped the entire bankruptcy jurisdictional system, conferring a larger supervisory role on the district courts--hence the change in Section 1452.[71] As with the history of the enactment of Section 1478, however, nothing in the transformation of Section

Removal to the bankruptcy courts.

> (a) A party may remove any claim or cause of action in a civil action, other than a proceeding before the United States Tax Court or a civil action by a Government unit to enforce such governmental unit's police or regulatory power, to the bankruptcy court for the district where such civil action is pending, if the bankruptcy courts have jurisdiction over such claim or cause of action.
>
> (b) The court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground. An order under this subsection remanding a claim or cause of action, or a decision not so remanding, is not reviewable by appeal or otherwise.

[69] *See* Pub. L. No. 95-598, 92 Stat. 2667 (1978).

[70] *See* 1 King, Collier on Bankruptcy *supra* ¶ 3.01[4][a] at 3-89.

[71] Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (1984); *see In re Clay*, 35 F.3d 190, 192-93 (5th Cir. 1994) (discussing *Marathon* and changes to bankruptcy jurisdictional system following it); *Phar-Mor, Inc. v. Coopers & Lybrand*, 22 F.3d 1228, 1234-35 (3d Cir. 1994) (same); 1 King, Collier on Bankruptcy *supra* ¶ 3.01[4][a] at 3-89. Consistent with these revisions, Section 1452 now contemplates removal to the District Court, reference of the matter to a bankruptcy judge, and then a right of review of the bankruptcy judge's decision by the district court.

1478 into Section 1452 supports an implicit repeal of Section 1447(d).[72]

Section 1452 was subsequently amended as part of the Judicial Improvements Act of 1990. The amendment replaced the statute's general bar to review provision with a more specific one, clarifying the elimination of all right of review beyond the district court level by enumerating the appellate jurisdictional statutes expressly disabled by the provision.[73] On the issue of motive, the findings section of the Improvement Act identifies "[t]he problems of cost and delay in civil litigation" as the general target of the amendment.[74] Similarly, the legislative history explains the amendment to Section 1452(b) as follows:

> Section 309 would amend 11 U.S.C. § 305(c) and 28 U.S.C. 1334(c)(2) and 1452(b) to clarify that, with respect to certain determinations in bankruptcy cases, they forbid only appeals from the district courts to the courts of appeals, not from bankruptcy courts to the district courts.
>
> . . .
>
> The proposed amendment would modify these three sections to provide that the decision of the bankruptcy court is not reviewable 'by the court of appeals . . . or by the Supreme Court of the United States . . . .' Such determinations would therefore be reviewable by the district court.
>
> Speeding the disposition of these types of motions will better serve the purpose of the limitation on appeals from the district courts to the courts of appeals.[75]

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[72] *See* 1 King, Collier on Bankruptcy *supra* ¶ 3.01[4][b] at 3-89.

[73] Pub. L. No. 101-650, § 309, 104 Stat. 5089 (1990).

[74] Pub. L. No. 101-650, § 102, 104 Stat. 5089 (1990).

[75] 136 Cong. Rec. S17,580 (Oct. 27, 1990). *See also* Report of the Federal Courts Study Committee, April 2, 1990, at 77 (discussing recommended change to Section 1452(b)).

Far from suggesting the inapplicability of Section 1447(d) in the bankruptcy context, the legislative history to the 1990 amendment actually suggests the opposite: Congress intended to eliminate appellate review of orders to promote judicial economy and administrative efficiency. This is consistent with continued application of Section 1447(d) in bankruptcy, and not an implicit intent to repeal.

The foregoing demonstrates that there is no evidence to support the implicit repeal of Section 1447(d) in the bankruptcy context and, in urging repeal, Petitioner has failed to demonstrate otherwise. Reference to the relevant rules of statutory construction cements the conclusion that Section 1452(b) does not implicitly repeal Section 1447(d) in bankruptcy.

E. The Relevant Rules of Statutory Construction Refute Petitioner's Contention that Section 1447(d) Does Not Apply in Bankruptcy.

A cardinal rule of statutory construction often repeated by this Court dictates that repeals by implication are not favored and will not be found unless the congressional intent to repeal is "clear and manifest." *Red Rock v. Henry*, 106 U.S. 596, 602 (1883). *Accord Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976); *United States v. Borden Co.*, 308 U.S. 188, 198 (1939); *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936); *United States v. Tynen*, 78 U.S. (11 Wall.) 88, 92 (1871). The party urging implied repeal bears a heavy burden in establishing the requisite intent. *Amell v. United States*, 384 U.S. 158, 165-66 (1966); *see also Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987) (repeal by implication will not be lightly inferred).

As this Court has identified, repeal by implication may be tolerated in two specific, well-settled situations:

> (1) where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act.

Posadas, 296 U.S. at 503. Neither situation is present here.

Irreconcilability has been found only where it is "impossible" to give effect to both statutes. *See Wilmot v. Mudge*, 103 U.S. 217, 221 (1880). *Accord Germain*, 503 U.S. at 253 ("so long as there is no 'positive repugnancy' between the two laws, . . . a court must give effect to both.") (citation omitted); *TVA v. Hill*, 437 U.S. 153, 190 (1978); *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974); *Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 439, 456-57, *reh'g denied*, 324 U.S. 890 (1945) ("Only a clear repugnancy between the old law and the new results in the former giving way . . ."); *Borden*, 308 U.S. at 198-99. Lacking here is anything remotely akin to the kind of irreconcilable conflict necessary to support the conclusion that one provision overturns the other in the bankruptcy context. *See Mancari*, 417 U.S. at 551; *Borden*, 308 U.S. at 198.

As this Court has stated in the context of defining when one statute may implicitly repeal another, "it is not sufficient to establish that subsequent laws cover some or even all of the cases provided for by it; for they may be merely affirmative, or cumulative or auxiliary." *Wood v. United States*, 41 U.S. (16 Pet.) 341, 362 (1842), *quoted in Borden*, 308 U.S. at 198. *Accord Germain*, 503 U.S. at 253. In this case, neither statute is offensive to the other and, because both are easily reconciled through concurrent application, effect should be given to both provisions. *Germain*, 503 U.S. at 252; *Mancari*, 417 U.S. at 551; *Borden*, 308 U.S. at 198.[76]

[76] As this Court has likewise stated, "[t]he courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1974). This preference for giving effect to congressional enactments wherever possible is thus well established. *See, e.g., Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155 (1976) (statutes should each be given effect where possible); *United States v. Borden Co.*, 308 U.S. 188, 198 (1939) ("[W]hen there are two acts upon the same subject, the rule is to give effect to both if possible.").

In construing a statute, the Court's duty is to give meaning to the legislature's intent. *Caminetti v. United States*, 242 U.S. 470, 485 (1917). The starting point for this inquiry is, of course, the statute's language. *Germain*, 503 U.S. at 253-54 ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there."); *Mallard v. United States District Court*, 490 U.S. 296, 300 (1989); *United States v. Ron Pair Enter., Inc.*, 489 U.S. 235, 241 (1989); *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1985). When the statute's language is clear, the inquiry should end where it begins. *Germain*, 503 U.S. at 254; *Ron Pair*, 489 U.S. at 241; *United States v. Rutherford*, 442 U.S. 544, 551 (1979). "The plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters.' " *Ron Pair*, 489 U.S. at 242 (quoting *Griffen v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982); *see Demarest v. Manspeaker*, 498 U.S. 184, 190-91 (1991); *Rubin v. United States*, 449 U.S. 424, 430 (1981).

In this case, not only is continued application of Section 1447(d) in the bankruptcy context demonstrably in keeping with the intent of its drafters, it is also in keeping with the general policies underlying Section 1452(b) as well as its own express language. Section 1447(d) means what it says[77] and there is no reason not to apply it in the bankruptcy context as it (and its predecessors) have been applied for over 100 years.

II. Section 1447(d) Should Be Construed in the Larger Context of the Policies and Purposes of the Bankruptcy Code.

Further support for the conclusions reached above is to be found from analysis of the issues within the larger context of the policies that animate bankruptcy administration as a

[77] *See* 1A Moore, Moore's Federal Practice *supra* ¶ 0.169[2.-1] at 688 ("Subsection (d) of § 1447 means exactly what it says.").

whole. As is clearly identified in the relevant legislative history, the drafters of the Bankruptcy Code envisioned a process that would be both expeditious and economical.[78] In light of this intent, as well as Congress' general intent to eliminate protracted litigation over where to litigate, there can be no presumption that the drafters of the Bankruptcy Code intended to permit wide-open appeals of jurisdictional remand orders.

Moreover, Sections 1447(d) and 1452(b) should be construed in light of Congress' systematic efforts in a variety of bankruptcy statutes to curtail appellate review in the context of litigation over where to litigate. In several instances, the bankruptcy statutes authorize the district courts to defer adjudication of an issue to some other tribunal.[79] In each of these instances, however, Congress has generally denied appellate review of the decision to defer in order to accomplish its objectives of judicial economy.[80] Section 1452(b) is merely one

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[78] *See, e.g., National Labor Relations Board v. Bildisco & Bildisco*, 465 U.S. 513, 517 n.1 (1984) (noting that Congress enacted the business reorganization provisions of the Bankruptcy Code "with the intention that business reorganizations should be quicker and more efficient . . .") (citing H.R. Rep. No. 95-595, p. 5 (1977)); *In re Stelweck*, 86 B.R. 833, 845 (Bankr. E.D. Pa. 1988) (stating "[o]ne of the primary concerns of this bankruptcy court is the expeditious administration and distribution of claims against the debtors' estates. In a Chapter 7 case, this means the expeditious liquidation and distribution of the estate to creditors."); *In re Interco Inc.*, 137 B.R. 993, 997 (Bankr. E.D. Mo. 1992) (relying on H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 354 (1977) and stating "Congress intended that the bankruptcy courts continue to use [11 U.S.C. § 502(c) prescribing a procedure for the estimation of contingent claims] to facilitate the speedy and expeditious resolution of claims in bankruptcy courts.").

[79] *See* 11 U.S.C. § 305(a) (1991) (permitting the bankruptcy court to abstain from hearing a bankruptcy case or suspend proceedings in a case in the interests of the parties and for other reasons); 28 U.S.C. § 1334(c)(1) (1994) (permitting the court to abstain from hearing any proceeding within a bankruptcy case on principles of comity); 28 U.S.C. § 1334(c)(2) (1994) (requiring the court to abstain under certain circumstances).

[80] *See* 11 U.S.C. § 305(c) (1991) (providing that a decision to abstain or suspend the proceedings is not reviewable on appeal); 28 U.S.C. § 1334(d) (1994) (same); 136 Cong. Rec. S17,580 (Oct. 27, 1990) *(Footnote continued)*

instance among several in which Congress has acted to prevent waste and inefficiency.[81]

Given the inherent lack of resources present in most bankruptcy cases, the administrative process in bankruptcy is particularly sensitive to issues of waste. Although Petitioner urges that appellate review of jurisdictional issues in the removal context would serve the salutary purpose of advancing the jurisprudence in this area, the context is clearly inappropriate. Questions of bankruptcy jurisdiction merit careful deliberation, but it makes no sense to suggest that Congress intended this deliberation to occur in the removal context. The weight of the law, history, logic, experience and policy stands against such a proposition.

(discussing purpose of 1990 amendments to these sections which further limited appellate review).

[81] The Court of Appeals for the Second Circuit has drawn the appropriate connection in this context:

> The Senate report accompanying § 305 states: "This section recognizes that there are cases in which it would be appropriate for the court to decline jurisdiction . . . ." S. Rep. No. 95-989 at 35, U.S. Code Cong. & Admin. News 1978, pp. 5787, 5821. Such abstention provisions in the bankruptcy context also appear at 28 U.S.C. §§ 1334(c) and 1452(b). These provisions permit a judge to refuse to assert jurisdiction over a case in favor of a proceeding in an alternate forum. Such abstention decisions are normally made at the outset of a case, before the abstaining court has acted to affect any of the parties' substantive rights and are, appropriately, unreviewable because they would place an unwarranted burden on scarce appellate resources and because the merits will be adjudicated elsewhere, from which an appeal will presumably then follow. *See* 28 U.S.C. §§ 1334(c)(2), 1452(b) (decisions to abstain not reviewable by courts of appeals by appeal or otherwise). *See also* 28 U.S.C. § 1447(d) (order remanding cases to state courts for lack of subject matter jurisdiction unreviewable).

In re Axona Int'l Credit & Commerce, Ltd., 924 F.2d 31, 35 (2d Cir. 1991). While Section 1447(d) applies to different kinds of remands than does Section 1452(b), its basic purpose is the same and it fulfills the same basic policies and goals. It would be inconsistent with the common policies and goals of these collective provisions to conclude that Section 1447(d) does not apply in bankruptcy.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be affirmed.

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